NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2004-K-1617**
VERSUS	*	**COURT OF APPEAL**
TERRELL THOMAS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 444-974, SECTION "E"
Honorable Calvin Johnson, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong,
Judge Dennis R. Bagneris, Sr., and Judge David S. Gorbaty)

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WRIT APPLICATION GRANTED; REVERSED; REMANDED

On January 26, 2004 the defendant Terrell Thomas was charged with one count each of possession of heroin and possession of cocaine, charges to which he subsequently pled not guilty. On August 8 the court held a combined preliminary hearing and hearing on the defendant's motion to suppress the evidence. At the conclusion of the hearing the court granted the motion to suppress the evidence. The State objected and noted its intent to seek writs. The court granted the State until September 9 to do so. On September 9, the court extended the return date to September 10, the date the writ was filed in this court. On September 27 this panel ordered the State to supplement its application with the August 9 transcript. On December 7, the panel again ordered the State to supplement its application. The State filed the transcript on February 2, 2005.

FACTS

At approximately 9:00 p.m. on Sunday, December 7, 2003 police officers were on routine patrol on S. Broad Street. The officer who testified at the suppression hearing stated that the area was a commercial area where there had been many business burglaries. As they were driving, the officers saw the defendant Terrell Thomas walk up to an alleyway located between two closed businesses, look around to this right and left, and then enter the

alleyway. The officers stopped their car a few buildings down the street and walked back to the alleyway, and they could see Thomas walking away from them down the alleyway. The officers called to him, and he immediately stopped, half-turned so that the left side of his body was toward the officers and the right side was away from them, and began dropping things from his right pocket. One of the officers shined his flashlight on the ground around Thomas while the other one detained him. The officers found on the ground one rock-like substance wrapped in plastic, a tinfoil packet later found to contain a white powdery substance, a hypodermic needle, and a metal spoon containing residue. The officers seized the objects and arrested Thomas. The officer stated that he heard and saw the objects as they hit the ground, and he never lost sight of them before he picked up them. The officer also testified that although he did not see any fences at the back of the alleyway, one could not cut through the alley to get to the next street.

DISCUSSION

The trial court granted the motion to suppress the evidence seized in this case because it found that the officers stopped the defendant before they had reasonable suspicion of criminal activity on his part. The State argues that the defendant's actions, coupled with his presence in an area of closed businesses where many burglaries had occurred, gave the officers reasonable

suspicion to stop him.

The evidence suppressed in this case was seized after the defendant abandoned it when the officers called to him. Officers cannot legally seize property abandoned by a defendant if the abandonment occurred pursuant to an infringement on the defendant's property rights. However:

> if . . . property is abandoned without any prior unlawful intrusion into a citizen's right to be free from government interference, then such property may be lawfully seized. In such cases, there is no expectation of privacy and thus no violation of a person's custodial rights.

State v. Belton, 441 So. 2d 1195, 1199 (La. 1983). See also *State v. Britton*, 93-1990 (La. 1/27/94), 633 So.2d 1208; *State v. Tucker*, 626 So. 2d 707 (La. 1993), opinion reaffirmed and reinstated on rehearing by 626 So. 2d 720 (La. 1993); *State v. Handy*, 2002-1025 (La. App. 4 Cir. 9/25/02), 828 So. 2d 1207. In *Britton*, the Court noted that "the police do not need probable cause to arrest or reasonable suspicion for an investigatory stop every time they approach a citizen in a public place." *Britton*, 93-1990 at p.2, 633 So. 2d at 1209.

In *Handy*, this court discussed a stop for purposes of determining whether abandoned property may be lawfully seized:

> An "actual stop" occurs when an individual submits to a police show of authority or is physically contacted by the police. *Tucker*. An "imminent actual stop" occurs when the police

> come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is virtually certain. *Id.* The Supreme Court listed the following factors to be considered in assessing the extent of police force employed in determining whether that force was "virtually certain" to result in an "actual stop" of the individual: (1) the proximity of the police in relation to the defendant at the outset of the encounter; (2) whether the individual has been surrounded by the police; (3) whether the police approached the individual with their weapons drawn; (4) whether the police and/or the individual are on foot or in motorized vehicles during the encounter; (5) the location and characteristics of the area where the encounter takes place; and (6) the number of police officers involved in the encounter. *Id.* An actual stop is imminent "when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is *virtually certain*." *Tucker*, 626 So.2d at 712.

Handy, at pp. 4-5, 828 So. 2d at 1210.

The Louisiana Supreme Court has divided encounters between police and citizens into three "tiers." *State v. Fisher*, 97-1133 (La. 9/9/98), 720 So. 2d 1179. In *Fisher*, pp. 4-5, 720 So. 2d at 1182-1183, the Court described the lowest tier of interaction:

> In *United States v. Watson*, 953 F.2d 895, 897 n. 1 (5th Cir.1992), *cert. denied*, 504 U.S. 928, 112 S.Ct. 1989, 118 L.Ed.2d 586 (1992), the court articulated a useful three-tiered analysis of interactions between citizens and police under the Fourth Amendment. At the first tier, mere

> communications between officers and citizens implicate no Fourth Amendment concerns where there is no coercion or detention. *Id*.; *State v. Britton*, 93-1990 (La.1/27/97); 633 So.2d 1208, 1209 (noting that police have the same right as any citizen to approach an individual in public and to engage him in conversation under circumstances that do not signal official detention).

See also *Handy*.

In *State v. Dobard*, 2001-2629 (La. 6/21/02), 824 So. 2d 1127, officers entered a bar to conduct a "vice check," wherein they intended to question patrons about gun or contraband possession. The officers had merely entered and identified themselves as police officers when the defendant turned from them and threw down crack cocaine. Despite the fact that the officers had no reasonable suspicion to stop the defendant prior to his abandonment of the cocaine, the Court nonetheless upheld the seizure of the cocaine because at the time the defendant abandoned the cocaine the officers had not yet infringed on his privacy rights. The Court stated: "The fact that the officers might have held a subjective intent to search patrons of Lo Dee's bar for narcotics or weapons is of no moment because defendant discarded the contraband before, rather than after, the officers acted to effectuate their subjective intent." *Id.*, at p. 9, 824 So. 2d at 1133.

Likewise, in *State v. Jackson*, 2000-3083 (La. 3/15/02), 824 So. 2d 1124, the Court found the officers' actions did not amount to a stop. The

officers received a tip concerning drug sales at a certain location. The officers went to that location and saw the defendant, who matched the description of the seller provided in the tip. As the officers drove up to the scene, the defendant quickly walked up onto a nearby porch. The officers exited their car, walked up to a fence near the porch, and identified themselves as police officers. The defendant appeared startled and dropped a packet of drugs from the porch onto the ground. The officers retrieved the packet and found it contained cocaine. The trial court denied the defendant's motion to suppress the evidence, but this court reversed on appeal. *State v. Jackson*, 99-2993 (La. App. 4 Cir. 10/18/00), 772 So. 2d 808. On review, the Supreme Court reversed this court. The Court acknowledged that one of the officers testified that the officers intended to stop the defendant by positioning themselves at the fence, but the Court found that the officer's testimony showed that the officers did not chase the defendant to the porch nor order him to stop prior to the defendant's abandonment of the cocaine. The Court stated:

> However, by merely identifying themselves as the police, before they asked respondent any questions, drew their weapons, or otherwise asserted their official authority over him, the officers had not yet "seized" respondent when he discarded his cocaine packet. Because respondent had immobilized himself by his own actions, the appropriate question here is not whether a reasonable person would have felt free to leave but

> whether a reasonable person would have felt "free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436, 111 S.Ct. 2382, 2387, 115 L.Ed.2d 389 (1991). Because a police officer possesses the same right as any citizen to approach an individual and ask a few questions, *Bostick,* 501 U.S. at 434, 111 S.Ct. at 2386, *State v. Duplessis*, 391 So.2d 1116, 1118 (La.1980), the police do not seize a person merely by standing approximately 10 feet away and identifying themselves without taking any additional measures to assert their authority over the person that he or she would not expect from the encounter if it had occurred with an ordinary citizen. . . . However, the encounter in the present case had not yet reached the point at which the officers communicated their suspicions when respondent let slip his cocaine packet. *See United States v. Mendenhall,* 446 U.S. 544, 554, n. 6, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (Stewart, J.) (subjective intent of the police officer to detain an individual relevant only to the extent "that [it] may have been conveyed" to the person). Nor, at that point, had the encounter turned into an "imminent actual stop" for purposes of Louisiana law. The officers had not yet used *any* force, much less come upon respondent "with such force that, regardless of [his] attempts to flee or elude the encounter, an actual stop.... [was] *virtually certain* ...." *State v. Tucker,* 626 So.2d 707, 712 (La.1993).

Jackson, 2000-3083 at pp. 2-4, 824 So. 2d at 1126. The Court found that the officers could lawfully seize the cocaine because the defendant abandoned the cocaine prior to any actions by the officers to stop him.

Here, the officer testified that he and his partner walked to the alleyway and saw the defendant walking away from them. The officer

testified that they "called to him," and the defendant stopped and dropped the evidence. The officer stated that they went to the alley "to see if he was employed or, in fact, it was going to be a business burglary in progress." The officer testified that they did not engage the defendant in any conversation, but merely "called to him." The officer also testified that he and his partner were probably twenty feet from the defendant when he discarded the evidence. Although the defense attorney premised a question with the words, "you said when you initially ordered Mr. Thomas to stop. . .," the officer never actually testified that he and his partner ordered the defendant to stop.

Thus, the most the officer admitted was that the defendant abandoned the evidence when the officers "called to him." As such, we find that the officers' actions fell within the first tier of interaction described by the Supreme Court in *Fisher*, and no reasonable suspicion was required for the officers to call to the defendant. Accordingly, we find the officers lawfully seized the evidence, and the trial court erred by suppressing it.

Even assuming, arguendo, that the officers' actions exceeded those of *Fisher's* first tier and instead constituted a stop, we find that the officers had reasonable suspicion of criminal activity to support the stop. In *State v. Thompson*, 2002-0333 pp. 5-6 (La. 4/9/03), 842 So. 2d 330, 335, the

Supreme Court addressed the standard for determining whether an officer has reasonable suspicion to conduct an investigatory stop:

> Reasonable suspicion for an investigatory stop is something less than probable cause and must be determined under the specific facts of each case by whether the officer had sufficient knowledge of particular facts and circumstances to justify the infringement on individual's right to be free from governmental interference. *State v. Varnell*, 410 So.2d 1108 (1982); *State v. Bickham*, 404 So.2d 929 (La.1981); *State v. Blanton*, 400 So.2d 661 (La.1981); *State v. Ault*, 394 So.2d 1192 (La.1981).
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> In determining whether or not reasonable cause exists to temporarily detain a person, the totality of the circumstances, "the whole picture," must be considered. *State v. Belton*, 441 So.2d 1195, 1198 (La.1983) (citing *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).)

Here, the officers were on patrol in an area where many business burglaries had occurred. The officers were patrolling at approximately 9:00 p.m. on a Sunday night. The officers observed the defendant glance quickly right and left and then enter an alleyway between two closed businesses. The officer testified that although he did not know whether the end of the alleyway was fenced, he knew that the alley did not extend to the next street. The officers approached the alleyway and saw the defendant walking away from them down the alleyway. If, indeed, the officers' call to the defendant

constituted a stop, we find that these factors gave the officers reasonable suspicion to stop the defendant. As such, they could lawfully seize the drugs and paraphernalia the defendant dropped when the officers hailed him.

Accordingly, we grant this writ application, we reverse the judgment of the trial court, which suppressed the evidence, and we remand the case for further proceedings.

WRIT APPLICATION GRANTED; REVERSED; REMANDED